

International Commercial Arbitration: Americanized, “Civilized,” or Harmonized?

ELENA V. HELMER*

I. HAS INTERNATIONAL COMMERCIAL ARBITRATION BECOME “AMERICANIZED”?

The term “Americanization of [international commercial] arbitration” was introduced in the mid-1980s, allegedly by Stephen Bond, then Secretary General of the International Court of Arbitration of the International Chamber of Commerce (ICC).¹ Ever since, an “academic confrontation . . . between those trained in the Anglo-Saxon legal profession and those having a Roman law orientation”² continues to produce debates in scholarly writings and at conferences as to how international commercial arbitrations are to be conducted and what is the role of Anglo-American lawyers in the development of international arbitration in general.

Americanization may be viewed positively³ or negatively,⁴ and its understanding often depends on the legal roots of a speaker or writer. For some U.S. lawyers, Americanization means converting European arbitrators to the “English language and to the usages of Anglo-Americans . . . , enlarg[ing] the club [of European arbitrators] and . . . rationaliz[ing] the practice of arbitration such that it could become offshore—U.S.-style—litigation.”⁵ On the Continent, “‘Americanization’ or an ‘American approach’ . . . is often a code word for an unbridled and ungentlemanly aggressivity and excess in arbitration. It can involve a strategy of ‘total

* Elena V. Helmer is an attorney in Columbus, Ohio and has taught international commercial arbitration at the University of Michigan Law School and in St. Petersburg, Russia. LL.M, Yale Law School; J.D. with honors, Kazakh State University Law School.

¹ See Nicolas C. Ulmer, *A Comment on “The ‘Americanization’ of International Arbitration?”*, 16 MEALEY’S INT’L ARB. REP. 24, 24 (2001).

² Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 ARB. INT’L 157, 158 (1998).

³ See, e.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 54–55 (1996).

⁴ Ulmer, *supra* note 1, at 24; see Pierre Lalive, *The Internationalisation of International Arbitration: Some Observations*, in *THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE* 49, 54 (Martin Hunter et al. eds., 1993) [hereinafter *THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION*].

⁵ DEZALAY & GARTH, *supra* note 3, at 53.

warfare,' the excesses of U.S.-style discovery, and distended briefs and document submissions."⁶ In a more balanced view (by the way, shared by a number of prominent U.S. practitioners in the field), "'Americanization' implies something of an excessive influence of Anglo-American or common law legal traditions on international arbitration, originally a European/civil law phenomenon."⁷ This excessive American influence involves, first of all, certain practices followed in U.S. courts, especially the prehearing production of documents (*i.e.*, discovery) and motion practice,⁸ at the expense of the speed, efficiency, and low cost of arbitral proceedings.⁹

"Judicialization" is a term frequently associated with Americanization.¹⁰ Judicialization ("legalisation" or "processualisation" in the words of Pierre Lalive)¹¹ is described as an effort to make arbitration "become more like litigation,"¹² in order to increase its predictability, reliability, and equity.¹³ The result of judicialization in arbitration is "formalism, judicial style, and diminished flexibility,"¹⁴ and eventually, transformation of arbitration into "offshore—U.S.-style—litigation."¹⁵

Whichever term we use, be it Americanization or judicialization, the meaning of the word remains the same: "[An] increasing tendency for the arbitration process to adopt or follow the formalism and technicalities of national judicial process," in particular, the "methods of American litigators," in international arbitration.¹⁶

⁶ Ulmer, *supra* note 1, at 24.

⁷ See Lucy Reed & Jonathan Sutcliffe, *The 'Americanization' of International Arbitration?*, 16 MEALEY'S INT'L ARB. REP. 37, 37 (2001).

⁸ See Delissa A. Ridgway, *International Arbitration: The Next Growth Industry*, DISP. RESOL. J., Feb. 1999, at 50, 51.

⁹ Edward R. Leahy & Carlos J. Bianchi, *The Changing Face of International Arbitration*, J. INT'L ARB., Aug. 2000, at 19, 51.

¹⁰ Lawrence W. Newman, *International Arbitration—Unfinished Business*, N.Y.L.J., Apr. 3, 2001, at 3; see DEZALAY & GARTH, *supra* note 3, at 57–58 (discussing judicialization of arbitration). See generally INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? (Richard B. Lillich & Charles N. Brower eds., 1993) [hereinafter INTERNATIONAL ARBITRATION IN THE 21ST CENTURY].

¹¹ See Lalive, *supra* note 4, at 54.

¹² Leahy & Bianchi, *supra* note 9, at 51.

¹³ *Id.*

¹⁴ Arthur W. Rovine, *Fast-Track Arbitration: A Step Away From Judicialization of International Arbitration*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 10, at 46.

¹⁵ DEZALAY & GARTH, *supra* note 3, at 53.

¹⁶ Lalive, *supra* note 4, at 54.

The whole debate of Americanization of international commercial arbitration springs from what has been called the “Common Law-Civil Law Divide.”¹⁷ The differences between the two legal systems are most visible in the area of procedure, and, not surprisingly, the majority of publications discussing the Americanization of international commercial arbitration concentrate on procedural issues.¹⁸ However, the concept of the “Great Divide” is not fully accepted in either legal tradition,¹⁹ and a “clash of legal cultures” is at most a questionable proposition.²⁰ For the purpose of this discussion, we will simply accept the existence of numerous differences between the Anglo-Saxon and Continental legal systems without going into this issue any further.

Do the procedural tactics and techniques of U.S. litigators in international commercial arbitration mean that arbitration has become “Americanized”? And if American influence on international commercial arbitration is broader than the procedural element alone, does it amount to Americanization of arbitration?

This Article examines several aspects of what might constitute Americanization of international arbitration: (1) the number of U.S. businesses participating in international arbitrations; (2) the growth in the number of American lawyers and law firms offering their services in relation to international commercial arbitration; (3) the United States as a forum for international arbitrations; (4) American influence on arbitral procedure; and (5) alternative dispute resolution (ADR) techniques employed in relation to international arbitration.

The author believes that American influence on international arbitration is significant, but falls short of Americanization. Rather, the current trends and developments in international commercial arbitration demonstrate an ongoing process of harmonization in many areas of international arbitration. This includes national arbitration laws, rules of major arbitration institutions, and arbitration practices, as demonstrated by the United Nations Commission on International Trade Law (UNCITRAL) and International Bar Association

¹⁷ See Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in International Arbitration*, 18 ARB. INT’L 59, 59 (2002).

¹⁸ See, e.g., Reed & Sutcliffe, *supra* note 7; Elsing & Townsend, *supra* note 17; Dr. Julian D.M. Lew & Laurence Shore, *International Commercial Arbitration Harmonizing Cultural Differences*, DISP. RESOL. J., August 1999, at 33; *Efficient Organization of International Arbitrations*, 8 WORLD ARB. & MEDIATION REP. 82 (1997).

¹⁹ See, e.g., D. Brian King & Lise Bosman, *Rethinking Discovery in International Arbitration: Beyond the Common Law/Civil Law Divide*, ICC INT’L CT. ARB. BULL., Spring 2001, at 24, 25; *Efficient Organization of International Arbitrations*, *supra* note 18, at 87–88.

²⁰ Cremades, *supra* note 2, at 159–60.

(IBA) documents as well as procedures adopted by international arbitral tribunals.

A. Parties to International Arbitrations

With the growing popularity of arbitration as a means of dispute resolution in international business,²¹ contracts containing arbitration clauses are becoming commonplace,²² and the number of arbitration institutions on all continents is growing rapidly.²³ Accordingly, during the last few decades, the number of arbitrations worldwide has increased dramatically. For example, between its founding in 1923 and 1976, the ICC International Court of Arbitration received three thousand requests for arbitration. In 1998 the ICC received its ten-thousandth case. "Thus, more than two-thirds of all cases brought to ICC arbitration arose in the last 20 years of its 75-year existence."²⁴ The number of requests for arbitration filed with the ICC in 2002 reached 593²⁵—up 31% from the 452 requests filed in 1997.²⁶ The international caseload of the American Arbitration Association (AAA) reached 649 cases in 2001 (the last year for which statistics are available).²⁷ During the 2001–2002 period, the London Court of International Arbitration (LCIA) received 159 cases—an 8% increase over the previous 24-month period.²⁸ Due to the nature of the process, there is no data available as to the

²¹ Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 9 (1986); see Fabien Gélinas, *Arbitration and the Challenge of Globalization*, J. INT'L ARB., Aug. 2000, at 117, 117.

²² Peter Gottwald, *International Arbitration: Current Positions and Comparative Trends*, 6 RIVISTA DELL' ARBITRATO 211, 211 (1996).

²³ See Lalive, *supra* note 4, at 52–54 (expressing concern over the proliferation of arbitration centers that have "mushroomed throughout the world"; Gélinas, *supra* note 21, at 118).

²⁴ W. LAURENCE CRAIG ET AL., THE INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 2 (3rd ed. 2000).

²⁵ See 2002 Statistical Report, ICC INT'L CT. ARB. BULL., Spring 2003, at 7, available at http://www.iccwbo.org/court/english/right_topics/stat_2002.asp.

²⁶ See 1997 Statistical Report, ICC INT'L CT. ARB. BULL., Spring 1998, at 6.

²⁷ Press Release, International Centre for Dispute Resolution (ICDR), ICDR Becomes World's Largest International Commercial Arbitral Institution 1 (May 16, 2002), at http://www.adr.org/upload/LIVESITE/focusArea/international/ICDRPR_pdf.pdf.

²⁸ LCIA Director-General's Review of 2002 (on file with author).

number of ad hoc arbitrations being held in the world, but the same trend is observed there as well.²⁹

Both the ICC and the AAA's International Centre for Dispute Resolution (ICDR) note the increase in the number of non-traditional users of their arbitration services, in particular, from the United States.³⁰ In addition to multinational corporations, who have long been the major participants in international arbitrations, medium and small-sized businesses are now going international.³¹ Electronic commerce also plays a significant role in this movement.³² As a result, arbitration has become widely recognized as the *normal*, rather than alternative, way of settling international commercial disputes.³³

It is clear, however, that American businesses (however numerous and influential in world economic relations) are not the only participants in international arbitrations. Every dispute has at least two parties, and the other party (or parties) practically always comes from a country other than the United States.³⁴ Therefore, as the number of American companies participating in international arbitrations increases, so does the number of

²⁹ See, e.g., G  linas, *supra* note 21, at 117; Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 94 (1995). "[T]he number of nonadministered arbitrations has been on the rise since the adoption of the UNCITRAL Arbitration Rules in 1976." *Id.*

³⁰ See G  linas, *supra* note 21, at 118; Stephen Gallagher, *Developments, Challenges, and Trends in International Arbitration and ADR: What Does the Future Hold?*, Presentation at the ABA 2002 Annual Meeting (Aug. 12, 2002).

³¹ See G  linas, *supra* note 21, at 118.

³² *Id.*

³³ See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 2 (1995) (citing Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 257, 293 (Pieter Sanders ed., 1987)).

³⁴ It is possible to have an international arbitration between companies from the same country. In the United States, under the Federal Arbitration Act (FAA), a relationship which is "entirely between citizens of the United States" may nevertheless fall under the New York Convention if it "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C.    202 (2000); see, e.g., *Fuller Co. v. Compagnie Des Bauxites De Guinee*, 421 F. Supp. 938, 944 (W.D. Pa. 1976) (upholding application of the New York Convention to a dispute between a Pennsylvania company and a Delaware company, as their contract had a "reasonable relationship" with Guinea and Switzerland, foreign countries); *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476 (7th Cir. 1997) (upholding application of the New York Convention to an arbitral award made in the United States as between two domestic corporations but involving a contract for the sale of consumer products in Poland).

foreign companies. In 2002, parties to ICC arbitrations came from 126 countries.³⁵ In 2001, cases handled by the AAA's ICDR involved "arbitrators and parties" from sixty-three nations (no statistics are available as to the nationalities of the parties).³⁶ Companies from North America constituted 13% of 2002 LCIA arbitrations.³⁷ The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) reports that in 2002, parties in its arbitrations represented thirty-five "jurisdictions," with the United States and Canadian parties being involved in only seven arbitrations (out of 120 total).³⁸

As a result, we are witnessing the growth of international arbitration "horizontally" due to the multiplication of new kinds of business transactions and new actors.³⁹ In this environment, as David Rivkin put it, Americanization means that more American companies are involved in international arbitration, but nothing more.⁴⁰

B. Counsel and Arbitrators

The number of American law firms and lawyers offering arbitration services (either as counsel or, in the case of individuals, also as arbitrators) is on the rise. In addition to a number of large law firms with a presence in the international arbitration field since the 1970s and early 1980s,⁴¹ the increase in non-traditional users of arbitration services leads to the arrival in arbitration of a new group of lawyers representing this category of clients,⁴² and on occasion, serving as arbitrators.⁴³

³⁵ 2002 Statistical Report, *supra* note 25, at 8.

³⁶ ICDR, *supra* note 27, at 1.

³⁷ LCIA Director-General's Review of 2002, *supra* note 28.

³⁸ SCC Institute Annual Report (2002) (on file with author).

³⁹ Gélinas, *supra* note 21, at 118.

⁴⁰ David Rivkin, Developments, Challenges, and Trends in International Arbitration and ADR: What Does the Future Hold?, Presentation at the ABA 2002 Annual Meeting, (Aug. 12, 2002).

⁴¹ DEZALAY & GARTH, *supra* note 3, at 52. The authors connect the entry of American law firms into the European world of international arbitration with the "first great arbitrations tied to the construction of large factories in the oil-producing countries" and the work of the Iran-United States Claims Tribunal. *Id.* According to the authors, "by the early 1980s all the major [law] firms had 'decided to get into this field' (international commercial arbitration)." *Id.* at 104.

⁴² This phenomenon has been mentioned by Stephen Gallagher. Gallagher, *supra* note 30.

⁴³ See DEZALAY & GARTH, *supra* note 3, at 47. "Many new users are bound to nominate arbitrators—and *a fortiori* lawyers—from their own legal settings." *Id.* This trend has also been mentioned by Stephen Gallagher. Gallagher, *supra* note 30.

Currently, many⁴⁴ American law firms offer their clients international arbitration as a part of a larger package of dispute resolution services.⁴⁵ A number of law firms (including White & Case and Coudert Brothers) have established separate international commercial arbitration departments; others provide arbitration-related services from within their litigation departments (e.g., Baker & McKenzie and Mayer, Brown, Rowe & Maw). With the worldwide presence of the U.S. "multinationals of law,"⁴⁶ it is not uncommon for both parties in international commercial arbitration to be represented by U.S. law firms or their overseas branches.⁴⁷ And, the increase in arbitration-related services transforms into an increase in profits. For example, according to Mayer, Brown, Rowe & Maw in Chicago, revenues generated by their international arbitration practice during the last five years increased tenfold.⁴⁸

A number of highly regarded American specialists in international commercial arbitration have emerged, and they also play a prominent role in international arbitration institutions worldwide. For example, three Secretary-Generals of the ICC during the 1990s came from the United States: Stephen R. Bond, Eric A. Schwartz, and Anne-Marie Whitesell.

No one would deny that U.S. law firms and lawyers are now major players in the international arbitration field. Does this active involvement in the arbitration game transfer the United States itself into a leading arbitration center of the world, akin to France or Switzerland?

C. The United States as a Forum for International Commercial Arbitrations

The answer to the above question is both yes and no. On the one hand, there are countless arbitrations taking place in the United States every year, although exact statistics are lacking. The AAA works relentlessly on promoting its services.⁴⁹ In 2001 the number of international cases filed with the AAA's ICDR reached 649, which moved the AAA to first place, in terms of caseload, among the major international arbitration institutions in the

⁴⁴ Newman, *supra* note 10, at 6 ("[A]s international arbitration becomes more widespread . . . law firms not theretofore practicing in the arbitration area become more active in the field.").

⁴⁵ DEZALAY & GARTH, *supra* note 3, at 37–38, 55.

⁴⁶ *Id.* at 44.

⁴⁷ See *id.* at 66, 66 n.3, 108. "While the arbitration took place in Paris, the leading lawyers were litigators from midtown Manhattan." *Id.* at 108.

⁴⁸ Martha Neil, *Small World, Big Business*, A.B.A. J., Sept. 2002, at 28, 28.

⁴⁹ See Smit, *supra* note 21, at 13.

world.⁵⁰ Forty-three percent of ICDR's cases involve amounts of one million dollars or more.⁵¹

On the other hand, most of the AAA's international cases involve an American party. According to the leading authority in international arbitration, AAA's number of truly international cases (cases where both parties are non-U.S.) is "modest" and cannot compete with the ICC numbers.⁵²

It has been noted that the most significant arbitrations, the ones involving the largest amounts of money and high political stakes, still take place outside the United States,⁵³ mostly in Europe.⁵⁴ Cases that are arbitrated in the United States, in the words of an arbitration insider, are "not the real big cases."⁵⁵ The really big cases get to the AAA only when the American party's economic power is overwhelming.⁵⁶

Indirect evidence of this relative inability to transform the United States into a center of international arbitration equal to Switzerland or France is the establishment of the European office of the AAA's ICDR in 1999 in Dublin, Ireland⁵⁷—closer to where the action is and, perhaps, away from U.S. domestic law and practices.

So, what holds the United States back? One of the main reasons for major international commercial arbitrations being held outside of the United States is the complexity of federal and state arbitration laws, which seem extremely tricky, and even bizarre, to foreign parties and lawyers trained in different legal traditions.

U.S. international arbitration law is currently three-tiered and requires its users to try to decipher how the Federal Arbitration Act (FAA), state international arbitration laws in selected jurisdictions, and basic (non-uniform) domestic arbitration law in each state relate to one another and to find the cases that fill in the blanks in the statutory structure.⁵⁸

⁵⁰ ICDR, *supra* note 27, at 1.

⁵¹ *Id.*

⁵² CRAIG ET AL., *supra* note 24, at 3.

⁵³ DEZALAY & GARTH, *supra* note 3, at 160; *see id.* at 152.

⁵⁴ ICSID arbitrations, which usually take place in Washington, D.C., and NAFTA arbitrations are beyond the scope of this Article due to the unique arbitration regimes of the ICSID and NAFTA, which combine public and private international law features.

⁵⁵ DEZALAY & GARTH, *supra* note 3, at 160.

⁵⁶ *Id.*

⁵⁷ AAA *Opens First European Center*, J. DISP. RESOL., June 2001, at 6, 6.

⁵⁸ James H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?*, 15 MICH. J. INT'L L. 785, 793 (1994)

INTERNATIONAL COMMERCIAL ARBITRATION

Not every foreign lawyer is willing (and able) to undertake such a task and also impose the expenses of hiring a local (American) counsel on his or her client.

For a long time, the United States was not a popular site for international arbitration because it did not ratify the 1958 New York Convention ("Convention") until 1970.⁵⁹ The Convention now is part of the law of the land, but other obstacles have emerged. The main arbitration law of the country, the Federal Arbitration Act of 1925,⁶⁰ which governs both domestic and international arbitration, is a "bare-bones statute directed primarily at insuring that courts give effect to arbitration clauses and awards, and prescribes no significant procedural standards."⁶¹ The Act is now quite outdated.⁶² Statutory gaps are being filled by judicial decisions that frequently contradict each other. Most states have their own arbitration laws. Some states adopted separate statutes to regulate international commercial arbitration.⁶³ Massive case law, both state and federal, complicates the issue even more by promoting "uncertainty"; and this large body of case law "may do more to discourage than attract [international] arbitrations to the United States."⁶⁴

The other reason why the United States may not be acceptable for foreign parties as the forum for international commercial arbitration is the U.S. litigation style. It is very possible that parties who agreed to arbitrate their disputes may nevertheless find themselves in a local court at the place of arbitration. It may happen, for example, when judicial assistance is needed to compel arbitration or to appoint an arbitrator, a dispute on jurisdiction arises ("who decides who decides"), or an award is challenged by the losing party. As the reputation of American civil procedure among foreign lawyers has yet to improve, the possibility of "Rambo-style" litigation⁶⁵ (in the words of a U.S. judge) does not help to attract arbitration business to the United States.

(footnotes omitted) (reviewing ISAAK I. DORE, *THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE* (1993)).

⁵⁹ Craig, *supra* note 33, at 13.

⁶⁰ 9 U.S.C. §§ 1–16 (2000).

⁶¹ Rau & Sherman, *supra* note 29, at 90 n.3.

⁶² See Newman, *supra* note 10, at 3.

⁶³ Included among these states are California, Colorado, Florida, Georgia, Ohio, and Texas, as well as others.

⁶⁴ DORE, *supra* note 58, at 134.

⁶⁵ Ridgway, *supra* note 8, at 51.

In addition, the ICC, for example, notes an increase in legal interference of the local courts in ICC arbitrations conducted in the United States.⁶⁶ After the 1995 United States Supreme Court decision in *First Options of Chicago, Inc. v. Kaplan*,⁶⁷ the question of who decides jurisdictional questions—the court or the arbitral tribunal—remains open.

Also, the United States may still lack the image of political neutrality akin to that of Switzerland or Sweden. Neutrality of the forum is as important in international arbitration as modern arbitration laws and a non-interventionist approach of the local courts.⁶⁸ A non-neutral forum may reduce the sense of fairness of the entire proceedings, which is very important in international arbitration.⁶⁹ With U.S. business and political interests extending worldwide, parties from other countries, especially less developed or economically weaker ones, often do not trust that the United States can provide a truly neutral forum for resolution of their disputes with American nationals.⁷⁰ This may not necessarily be true, and often is not true, as U.S. arbitrators, arbitral institutions, and courts may very well be truly neutral, or even sympathetic to the non-American party. However, unjustifiable concerns may nevertheless prevail over the logic of facts.

At the same time, positive attributes and developments are not lacking. The ICC notes an increase in the number of its international arbitrations administered in the United States, particularly in California, Texas, and Florida.⁷¹ The selection of these locales is not a surprise because all of these states have adopted the UNCITRAL Model Law on International Commercial Arbitration. The Federal Arbitration Act, at some point of time in the near future, will be amended or replaced, although it seems unlikely that the United States will adopt the UNCITRAL Model Law.⁷² In addition, the knowledge and understanding of international commercial arbitration among lawyers and business people is improving with more law schools offering this course to students and with the educational and promotional

⁶⁶ Lorraine Brennan, Developments, Challenges, and Trends in International Arbitration and ADR: What Does the Future Hold?, Presentation at the ABA 2002 Annual Meeting (Aug. 12, 2002).

⁶⁷ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

⁶⁸ See Craig, *supra* note 33, at 12–13 (discussing the many sides of neutrality in international arbitration).

⁶⁹ See Dr. Christian Borris, *The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 2–3 (Stefan N. Frommel & Barry A.K. Rider eds., 1999).

⁷⁰ See Craig, *supra* note 33, at 13.

⁷¹ Brennan, *supra* note 66.

⁷² See Carter, *supra* note 58, at 795–96.

efforts of the AAA, ICC, ICSID, CPR Institute for Dispute Resolution, Institute for American and International Law (formerly the Southwestern Legal Foundation), ABA, and other institutions and bar associations. These collective efforts help improve the arbitration climate in the United States and make the country more attractive as a forum for international arbitrations.⁷³ At present, the “United States has a . . . reputation as one of the more favorable sites in spite of its rather confusing laws.”⁷⁴

Do these developments, however, amount to Americanization of international commercial arbitration? Hardly so, as the United States is currently one of the several major arbitration countries of the world, but not the only one, and not even a dominating one like France or Switzerland. While it will always be an attractive forum for American businesses and their lawyers, for a number of reasons (the perceived lack of neutrality being just one of them), the United States will often lack attractiveness in the views of their counterparts from other countries.

D. Procedure

Although arbitration has long been used in the Anglo-American legal system, modern international commercial arbitration was born and nourished in Continental Europe, in particular, within the Paris-based ICC,⁷⁵ which established its International Court of Arbitration in 1923. Not surprisingly, arbitration has developed for a long time within the Continental legal tradition. Moreover, arbitration proceedings were rather informal and dominated by a narrow circle of primarily legal scholars.⁷⁶

International commercial arbitration began experiencing strong American influence in the 1970s when the first teams of U.S. lawyers arrived in Europe to represent their clients in the large petroleum arbitrations.⁷⁷ Almost immediately, the American litigation style and trial techniques, which the U.S. lawyers brought with them, began changing the way international commercial arbitrations were conducted in that they started looking “more like litigation.”⁷⁸ Not surprisingly, arbitral procedure is the

⁷³ Laurence Craig notes that the United States is becoming more acceptable as a site for international arbitrations than it used to be, particularly for disputes involving Asian parties. See Craig, *supra* note 33, at 56.

⁷⁴ Carter, *supra* note 58, at 794.

⁷⁵ See DEZALAY & GARTH, *supra* note 3, at 127.

⁷⁶ See *id.* at 31.

⁷⁷ *Id.* at 52.

⁷⁸ *Id.* at 55.

single element of international arbitration that is said to be most "Americanized."

International commercial arbitration has traditionally been "less formal, less legalistic, faster, and more final than judicial proceedings."⁷⁹ It has also been less expensive than litigation in national courts.⁸⁰ With the arrival of American law firms, arbitration turned into a sort of "off-shore litigation."⁸¹ Due to a greater use of American trial methods, costs and delays in arbitral proceedings began to soar. Discovery, depositions, challenge of arbitrators, simultaneous litigation proceedings in several fora, and tactical maneuvers have become commonplace in international arbitration and a source of concern for European arbitrators and practitioners.⁸² According to Pierre Lalive, "[i]nternational arbitration is therefore exposed to lose its well-known, or alleged, flexibility and its traditional peaceful and conciliatory character"⁸³ due to the "role and methods of American litigators in international arbitrations."⁸⁴

During the last quarter of a century, major U.S. law firms active in the international arbitration arena have become quite sophisticated in the arbitration game, be it Continental or Anglo-American style.⁸⁵ However, the continuing flow of American newcomers into international arbitration necessarily means that they keep bringing with them the familiar procedural techniques, court standards of minimum contacts between the arbitrators and the parties (and their counsel), and other practices foreign to traditional international arbitration.⁸⁶ Thus, many American attorneys still expect international arbitration to be but one "kind of litigation,"⁸⁷ simply in a "different forum,"⁸⁸ and behave during arbitration hearings "as if a jury was

⁷⁹ Rau & Sherman, *supra* note 29, at 91 n.7.

⁸⁰ See Smit, *supra* note 21, at 11.

⁸¹ See DEZALAY & GARTH, *supra* note 3, at 53.

⁸² See, e.g., Lalive, *supra* note 4, at 52 (criticizing the "lack of 'international and comparative outlook' of too many practitioners, who merely transpose into international arbitration proceedings their traditional national recipes and the 'aggressive' tactics which they use in their own courts").

⁸³ *Id.* at 54.

⁸⁴ *Id.*

⁸⁵ See DEZALAY & GARTH, *supra* note 3, at 42.

⁸⁶ Gallagher, *supra* note 30.

⁸⁷ DEZALAY & GARTH, *supra* note 3, at 55.

⁸⁸ *Id.*

there.”⁸⁹ This unfortunate trend leads to judicialization of international arbitration at the expense of its traditional virtues: speed and economy.

The Anglo-American litigation tradition has a number of useful features, and lawyers trained in the United States do possess some unique skills—procedural management being just one of them. In the words of a Swiss practitioner, “Common law lawyers have . . . often-demonstrated greater energy and training in obtaining, analyzing and arguing the facts on which most arbitrations are won or lost.”⁹⁰ The strength of American attorneys in procedural management and litigation tactics may not be liked on the Continent, but it is well recognized there.

It is natural for lawyers to use the skills and methods they are trained in and accustomed to whenever they are called on to provide their professional services. There is no problem if it happens within the context of domestic arbitration as usually both parties come with the same expectations as to the procedure to be followed. However, in international arbitration, parties usually come from different countries and, not infrequently, from countries that belong to different legal traditions. In such a setting, imposition of procedural rules and methods of one of the parties may denounce the sense of fairness of the entire proceeding and leave the other party (and possibly at least one arbitrator) feeling disadvantaged and disappointed.

Not surprisingly, international arbitration has rapidly begun to develop ways to deal with the “Great Divide” in arbitration procedure through the evolving practice of arbitral tribunals; changes in institutional and other arbitration rules; numerous initiatives of various arbitration institutions; and the efforts of UNCITRAL, the International Bar Association, and other organizations. As a result, the “invasion,” which has brought “more rigor and increased competition . . . into the European arbitral system, . . . has strengthened arbitration generally and . . . resulted in better . . . awards.”⁹¹ We will discuss some of these improvements later.

E. Arbitration-related ADR

In no other area is the Americanization claim more justified than in the area of ADR. Since the 1990s, ADR methods, although not necessarily of American origin⁹² (they had been used in Asian and many other countries of

⁸⁹ Rau & Sherman, *supra* note 29, at 95 (quoting Dominic Egan, *Splendid Isolation*, LEGAL BUS., May 1994, at 67, 67).

⁹⁰ Ulmer, *supra* note 1, at 24.

⁹¹ *Id.* at 25.

⁹² Leahy & Bianchi, *supra* note 9, at 60. “Asian states have taught Western regimes the importance of conciliation.” *Id.*

the world long before making an entry into the U.S. dispute resolution field), are gaining popularity in international commercial arbitration.⁹³

ADR methods (e.g., conciliation, mediation, Med-Arb, MEDALOA, mini-trials, or the use of a third-party referee) now constitute a part of dispute resolution services offered by various international arbitration centers throughout the world. Practically all of the major arbitration institutions, including the ICC, AAA, LCIA, ICSID, and SCC, have adopted their own ADR rules.⁹⁴ According to Stephen Gallagher, the AAA VP International, the AAA offers mediation services to every applicant filing for arbitration, with an 85% success rate.⁹⁵ The ICC also notes an increase in the number of two-tier dispute resolution clauses providing first for some form of ADR proceedings and then for arbitration.⁹⁶

Although ADR methods might be criticized as containing nothing new,⁹⁷ they are gaining popularity among disputants. Ironically, American ADR methods have originated and are being used to deal with exactly the same problems which, among other things, gave rise to the claim of Americanization of international arbitration: costs, delays, procedural maneuvers, excessive judicialization of procedure, large teams of lawyers, and massive document discovery.⁹⁸ Now, American ways of dealing with American litigation problems are being utilized to fight Americanization in international commercial arbitration.

⁹³ Gélinas, *supra* note 21, at 120; see Martin Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty-First Century*, 16 ARB. INT'L 379, 383 (2000).

⁹⁴ ICC ADR R., at http://www.iccwbo.org/drs/english/adr/pdf_documents/adr_rules.pdf (in force as from July 1, 2001); AAA INT'L MEDIATION R., at <http://www.adr.org/index2.1.jsp?JSPssid=15747> (amended and effective July 1, 2003); LCIA MEDIATION P., at <http://www.lcia-arbitration.com/med/index.htm> (effective June 24, 2002); R. MEDIATION STOCKHOLM MEDIATION INST., at http://www.sccinstitute.com/_upload/shared_files/regler/mediation.pdf (in force as of Apr. 1, 1999).

⁹⁵ Gallagher, *supra* note 30.

⁹⁶ Brennan, *supra* note 66.

⁹⁷ See Lalive, *supra* note 4, at 54.

⁹⁸ "It would be a paradox . . . if Americans were to export into international arbitration the very procedural excesses that have driven U.S. companies into the arms of domestic ADR." Ridgway, *supra* note 8, at 51; see also Hunter, *supra* note 93, at 385. "In the USA the low esteem in which the public holds 'contingency fee plaintiff attorneys' has driven businessmen into the arms of the thriving ADR industry." *Id.*

II. HARMONIZATION IN INTERNATIONAL COMMERCIAL ARBITRATION

Many prominent practitioners and academics in the field agree that the complex processes currently taking place in international commercial arbitration can be best characterized as “harmonization,”⁹⁹ “homogenization,”¹⁰⁰ “convergence,”¹⁰¹ or a “hybrid”¹⁰² of the two great legal traditions.¹⁰³ International commercial arbitration practice is developing new ways of conducting arbitral proceedings in “cross-cultural” arbitrations. The proceedings now combine the best of U.S. and Continental litigation practices¹⁰⁴ with some new approaches, which neither of these legal systems can call their own, but which are hybrids of the both. In the words of Bernardo Cremades, “international arbitration is presently undergoing a process of harmonization in its basic notions through a limitless combination of its different elements in order to achieve a pleasing effect: the adaptation of legal systems throughout the world to a global economic market.”¹⁰⁵

Harmonization is also apparent when one compares the rules of the major arbitration institutions, as well as the arbitration laws of various countries. The driving force behind the harmonization process has primarily been UNCITRAL, which drafted and introduced numerous documents intended for use in cross-cultural arbitrations around the world. Some of the important developments in the areas of procedure, governing arbitration rules, and national and international legislation are discussed below.

⁹⁹ Marc Blessing, *Globalization (and Harmonization?) of Arbitration*, J. INT’L ARB., Mar. 1992, at 79, 82; Lew & Shore, *supra* note 18, at 34.

¹⁰⁰ Reed & Sutcliffe, *supra* note 7, at 37.

¹⁰¹ Elsing & Townsend, *supra* note 17, at 59.

¹⁰² *Efficient Organization of International Arbitrations*, *supra* note 18, at 88 (“Professor Hans Smit of Columbia . . . has emphasized that international arbitral tribunals have evolved a system that’s neither civil law nor common law, but a hybrid that is drawn on both systems.”).

¹⁰³ Such was also the unanimous opinion of the nine-member panel of distinguished arbitration practitioners, which included such an authority as Judge Howard M. Holtzmann, at the ABA Conference, Dispute Resolution by the Rules: Opportunities in Mediation and Arbitration, Washington, D.C. (Sept. 12, 2003).

¹⁰⁴ Reed & Sutcliffe, *supra* note 7, at 37.

¹⁰⁵ Cremades, *supra* note 2, at 157.

A. Harmonization of Procedure

A number of very informative articles have already discussed the various methods currently used in international arbitration.¹⁰⁶ Therefore, we will briefly comment only on some areas where the American style differs most significantly from the civil law approach and where the harmonization trend is therefore most visible (*viz.*, discovery, document submission and examination of witnesses and expert witnesses).

1. Discovery

Although discovery is traditionally considered a common law feature, there is no uniformity as to how it is conducted between even the “cousins”—British and American civil procedures. When it comes to the Continent, “the word ‘discovery’ rank[s] second only to ‘punitive damages’ in terms of its capacity to strike terror into the civil law hearts,” as noticed by a couple of insightful practitioners.¹⁰⁷ Continental lawyers are accustomed to a different kind of “discovery” (or rather “disclosure”): lawyers for each side produce all relevant documents to support their claim or defense, and the judge (or an arbitrator) may question witnesses, appoint experts, and, in a number of countries, also order a party to produce relevant evidence.¹⁰⁸

Discovery can be a very useful procedural device, especially in cases in which one of the parties does not have access to the necessary evidence for reasons beyond its reasonable control.¹⁰⁹ Recognizing its usefulness, many civil lawyers and arbitrators now accept this procedure “as long as it is not called ‘discovery’” and does not allow “fishing expeditions.”¹¹⁰ Instead of imposing U.S.-style mass discovery on the “foreign” party or disposing of discovery completely, a middle ground has been found in international commercial arbitration—limited discovery.¹¹¹

The best example of this new practice of limited discovery is Article 3 of the Rules on the Taking of Evidence in International Commercial Arbitration

¹⁰⁶ See Elsing & Townsend, *supra* note 17; Reed & Sutcliffe, *supra* note 7; King & Bosman, *supra* note 19, at 24; Lew & Shore, *supra* note 18, at 33; *Efficient Organization of International Arbitrations*, *supra* note 18; Rau & Sherman, *supra* note 29.

¹⁰⁷ King & Bosman, *supra* note 19, at 25.

¹⁰⁸ *Id.* at 27; see, e.g., Reed & Sutcliffe, *supra* note 7, at 38–43.

¹⁰⁹ King & Bosman, *supra* note 19, at 31.

¹¹⁰ Elsing & Townsend, *supra* note 17, at 61.

¹¹¹ Rau & Sherman, *supra* note 29, at 103.

adopted in 1999 by the International Bar Association.¹¹² Although the word “discovery” is thoughtfully omitted from the IBA Rules of Evidence, Article 3 provides for submitting “all documents available to [the party] on which it relies,” to the other party and the tribunal.¹¹³ In addition, a party may submit to the arbitral tribunal a Request to Produce,¹¹⁴ which should contain:

- (a) (i) a description of a requested document sufficient to identify it, or
- (ii) a description in sufficient detail . . . of a narrow and specific requested category of documents that are reasonably believed to exist;
- (b) a description of how the documents requested are relevant and material to the outcome of the case; and
- (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.¹¹⁵

It is obvious how this process differs from the one established by the Federal Rules of Civil Procedure,¹¹⁶ both in the scope of discovery and in the obligations imposed on a party requesting discovery. “Fishing expeditions” are prevented, but reasonable disclosure of information necessary for the just resolution of the case is made possible. “This is a blend of the common law approach, because it includes the production of categories of relevant documents as well as individual documents, and the civil law approach, because the documents (including the categories of documents) must be identified with reasonable specificity.”¹¹⁷ Therefore, this kind of limited discovery becomes acceptable to lawyers from both legal traditions.

At the same time, other components of U.S.-style discovery, such as depositions and interrogatories, have not found a way into international arbitration.¹¹⁸ The IBA Rules of Evidence, for example, are silent on those practices. This silence does not mean that the parties may not use other components of U.S.-style discovery if they so agree. It simply means that the document representing the growing consensus on how evidential matters are to be handled in cross-cultural arbitrations, by the mere fact of omission of additional U.S. discovery practices, withdraws its “blessings” from those

¹¹² IBA R. TAKING EVID. INT’L COM. ARB., at <http://www.ibanet.org/pdf/rules-of-evid-2.pdf> (adopted June 1, 1999) [hereinafter IBA R. EVID.].

¹¹³ *Id.* art. 3.1.

¹¹⁴ *Id.* art. 3.2.

¹¹⁵ *Id.* art. 3.3

¹¹⁶ FED. R. CIV. P. 26.

¹¹⁷ Reed & Sutcliffe, *supra* note 7, at 40.

¹¹⁸ See Rau & Sherman, *supra* note 29, at 103.

practices in order to preserve specificity of international arbitration, make it mutually acceptable for parties from various legal traditions, keep it speedier, and control costs.

2. Document Submission and Examination of Witnesses

Traditionally, due to the presence of the jury, oral presentation of evidence and examination and cross-examination of witnesses by the parties' counsel constitute a major part of a common law trial.¹¹⁹ However, in a Continental hearing, oral presentation of evidence, including witness examination, is less important as greater weight is usually awarded to document evidence than witness statements and as the majority of evidence is already in the dossier.¹²⁰ Most civil lawyers are not skilled in the art of cross-examination and view it "with abhorrence."¹²¹ The trial concentrates on legal argument and is controlled by the judge or an arbitrator.¹²²

In conducting the hearing, international arbitrations usually follow the Continental model. The arbitral tribunal exercises "complete control" over the process,¹²³ thus reducing the role of counsel.¹²⁴ Use of comprehensive written submissions in international arbitration is also well established now.¹²⁵ Instead of a "short and plain statement of the claim,"¹²⁶ typical for Anglo-American litigation, arbitration usually starts with a detailed claim supported by all (or most) of the documents on which the claimant relies to prove his case.¹²⁷ The parties also provide detailed witness statements¹²⁸ and expert reports.¹²⁹ Thus, international arbitral proceedings are more

¹¹⁹ See generally *Efficient Organization of International Arbitrations*, *supra* note 18, at 84. For Anglo-Americans, "a hearing is not only the main event, it is the only event that matters. Statements made about the case and documents presented preliminarily have to be presented and offered in evidence at the hearing . . . [F]or Americans, what trials are about, to a great extent, is cross-examination." *Id.*

¹²⁰ Elsing & Townsend, *supra* note 17, at 62.

¹²¹ Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY*, *supra* note 10, at 7.

¹²² *Efficient Organization of International Arbitrations*, *supra* note 18, at 83–84.

¹²³ IBA R. EVID., *supra* note 111, art. 8.1.

¹²⁴ Rau & Sherman, *supra* note 29, at 97.

¹²⁵ Lew & Shore, *supra* note 18, at 35.

¹²⁶ FED. R. CIV. P. 8(a).

¹²⁷ Elsing & Townsend, *supra* note 17, at 60.

¹²⁸ *Id.* at 63; e.g., Reed & Sutcliffe, *supra* note 7, at 41.

¹²⁹ Elsing & Townsend, *supra* note 17, at 64.

document-oriented (like the civil law tradition) than Anglo-American civil procedure.¹³⁰

At the same time, many lawyers with a civil law background now recognize that oral witness examination of some type can be very useful, and lawyers and arbitrators from common law countries also soften their approach to oral examination.¹³¹ Harmonized practices have emerged. First of all, oral testimonies are shortened or not used at all.¹³² Instead, parties submit written witness statements in the course of the written phase of the arbitral proceeding.¹³³

Secondly, direct examination of witnesses is either dispensed with completely when parties and arbitrators rely on the witnesses' written statements, or is limited to points which summarize their written statements. Both arbitrators and counsel may ask questions, and the order of questioning is either established in advance by the parties (often in the course of a pre-hearing conference) or determined by the arbitral tribunal. The harmonizing approach to questioning involves counsel conducting examination (and cross-examination) of witnesses before the tribunal starts asking their own questions. Thus, examination-in-chief and cross-examination are not separated into two phases as in the common law tradition.¹³⁴ In such a case, both common law and civil law parties feel satisfied as their procedural traditions have been followed in the arbitral proceedings.¹³⁵

The scope of cross-examination in international arbitration differs from U.S. court practices as well. In the United States, cross-examination is usually limited to the scope of direct examination.¹³⁶ In arbitration, because direct examination is often shortened significantly, cross-examination covers all of the issues the witness covers in his written statement.¹³⁷ And cross-examination is usually not as hostile as in the U.S. courts, which makes it less objectionable to Continental lawyers.¹³⁸

¹³⁰ Reed & Sutcliffe, *supra* note 7, at 44.

¹³¹ Peter R. Griffin, *Recent Trends in the Conduct of International Arbitration: Discovery Procedures and Witness Hearings*, J. INT'L ARB., Apr. 2000, at 19, 26; e.g. Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, in MICH. Y.B. INT'L LEGAL STUD. 176-77 (1985).

¹³² Elsing & Townsend, *supra* note 17, at 63.

¹³³ *Id.*; see also IBA R. EVID., *supra* note 112, arts. 4.4 to 4.6.

¹³⁴ RENE DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 296 (1985).

¹³⁵ See Lew & Shore, *supra* note 18, at 35; Reed & Sutcliffe, *supra* note 7, at 41.

¹³⁶ Griffin, *supra* note 131, at 28.

¹³⁷ *Id.*

¹³⁸ DAVID, *supra* note 134, at 296.

The IBA Rules of Evidence provide for an innovative technique related to witness questioning in arbitration: "confrontation testimony" (also called "witness conferencing").¹³⁹ In confrontation testimony, witnesses testify on the same issue together, not one after another. If the witnesses contradict each other, they can be examined regarding their controversies on the spot.¹⁴⁰ Confrontation testimony is neither American nor Continental and seems to fit international arbitration quite well to further extend the number of procedural options acceptable to parties and counsel from different legal traditions.

Interestingly, the IBA Rules of Evidence allow the party or the party's officer to be heard as a witness,¹⁴¹ which is not allowed in the civil law trial where the party cannot be a witness in its own case. In international arbitration, the harmonized approach is that the source of information does not matter. Arbitrators are the judges of the admissibility, relevance, materiality, and weight of evidence.¹⁴² As a result, international arbitration hearings are often something of an "amalgam of the two traditions, with witness testimony frequently presented in affidavit or summary-statement form, and, when live testimony is presented, with limited cross-examination."¹⁴³

3. Expert Witnesses

In Anglo-American procedure, it is typical for the parties to present their own experts who are "specialized form[s] of witnesses."¹⁴⁴ In the Continental legal system, experts are usually neutral and appointed by the court or the arbitral tribunal itself.¹⁴⁵

In international arbitration, both party-appointed and tribunal-appointed experts are now common,¹⁴⁶ and their reports are provided in writing and may be heard during the hearing.¹⁴⁷ Both parties and the tribunal may also question the experts at the hearing.¹⁴⁸ This is a blend of common and civil law practices—a good example of harmonization in arbitral proceedings.

¹³⁹ See Wolfgang Peter, *Witness 'Conferencing,'* 18 ARB. INT'L 47, 48 (2002).

¹⁴⁰ IBA R. EVID., *supra* note 112, art. 8.2.

¹⁴¹ *Id.* art. 4.2.

¹⁴² *Id.* art. 9.1.

¹⁴³ Rau & Sherman, *supra* note 29, at 92.

¹⁴⁴ *Efficient Organization of International Arbitrations*, *supra* note 18, at 86.

¹⁴⁵ Elsing & Townsend, *supra* note 17, at 63–64.

¹⁴⁶ See IBA R. EVID., *supra* note 112, arts. 5–6.

¹⁴⁷ Elsing & Townsend, *supra* note 17, at 64.

¹⁴⁸ *Id.*; IBA R. EVID., *supra* note 112, art. 6.6.

Moreover, the IBA Rules of Evidence provide for an English procedure called “muting of experts.” Experts for both parties meet without counsel and try to eliminate extremes in their opinions. Then the experts come to the tribunal with a joint statement on as many points as possible.¹⁴⁹ The remaining controversies go to trial. This process helps reduce the costs and time associated with examination and cross-examination of expert witnesses, which are so typical in Anglo-American civil litigation.

The several examples from the procedural area of arbitration mentioned above demonstrate the development of a harmonizing approach as to how the arbitral proceedings are to be conducted. As Pierre Lalive stated, there is a “definite evolution towards the ‘internationalisation’ of general principles of procedure, and it is no longer possible to oppose . . . common law and civil law types of arbitration.”¹⁵⁰ Arbitration departed from the extremes of both legal traditions in favor of more settled, middle ground practices which are acceptable to parties coming from different countries and different legal systems. American influence on arbitral procedure remains significant, but so does Continental influence. The future is somewhere in the middle, with the best of both styles being used to the advantage of the parties and in the interest of the fair and speedy resolution of a dispute.

B. Harmonization of Arbitration Rules

1. Rules of the Major Arbitration Institutions

The current rules of the major arbitration institutions rarely reflect the characteristic features of the legal systems of the countries where such institutions are located. To the contrary, the Rules of the ICC (Paris), LCIA (London), SCC (Stockholm), and AAA (New York) have much more in common than one would expect taking into account their locations and the legal traditions of the host countries. All of these Rules provide for flexibility of procedure, allow arbitrators to have greater control over the arbitral process, and avoid references to their respective domestic legal customs. None of the Rules prescribes how the hearing is to be conducted or how witnesses are to be examined (unlike, for example, the AAA domestic arbitration rules).¹⁵¹ It is up to the parties and arbitrators to agree upon the procedure and all of its aspects. This way, modern arbitration rules smooth

¹⁴⁹ IBA R. EVID., *supra* note 112, art. 5.3.

¹⁵⁰ Lalive, *supra* note 4, at 56.

¹⁵¹ AAA COM. ARB. R. & MEDIATION PROC. art. 30, at <http://www.adr.org/index2.1.jsp?JSPssid=15747> (amended and effective July 1, 2003).

the sharp edges of both Anglo-American and civil law approaches to the conduct of arbitration in order to attract arbitration business.

The rules of major arbitration institutions provide that it is the responsibility of the arbitrators to conduct the proceedings in the most efficient way. For example, the ICC Rules of Arbitration leave the parties and the tribunal considerable freedom as to how to establish the facts of the case: "The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."¹⁵² To counter the civil law tradition of only producing evidence that is favorable to a party's case, the ICC Rules allow the tribunal to "summon any party to provide additional evidence."¹⁵³ This means that the ICC tribunal may order discovery, but the extent of it is to be determined by the tribunal itself (unless the parties agreed otherwise on such procedures). As we see, the ICC Rules leave the parties and the tribunal enough flexibility to determine how the proceedings are to be conducted and the evidence will be produced.

The AAA International Arbitration Rules¹⁵⁴ also provide for flexibility and mixed procedures and "do not much deviate from the European" rules.¹⁵⁵ The AAA Rules award the tribunal with the right to conduct arbitration "in whatever manner it considers appropriate."¹⁵⁶ Witnesses' written statements are specifically mentioned,¹⁵⁷ and the tribunal may appoint "independent experts."¹⁵⁸ While "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense,"¹⁵⁹ the tribunal "may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate."¹⁶⁰ Thus, the core American arbitration institution got away from the American rules of wide-range discovery.

The Rules of the London Court of International Arbitration¹⁶¹ are, perhaps, more influenced by common law (and more detailed) than any other major set of arbitration rules. For example, unless the parties agreed otherwise, the arbitral tribunal may "order any party to produce . . . any

¹⁵² ICC R. ARB. Art. 20.1, at <http://www.iccwbo.org/court/English/arbitration/rules.asp> (effective Jan. 1, 1998).

¹⁵³ *Id.* art. 20.5.

¹⁵⁴ AAA INT'L ARB. R., at <http://www.adr.org/index2.1.jsp?JSPssid=15747> (as amended and effective July 1, 2003).

¹⁵⁵ Rau & Sherman, *supra* note 29, at 91 n.6.

¹⁵⁶ AAA INT'L ARB. R., *supra* note 154, art. 16.1.

¹⁵⁷ *Id.* art. 20.5.

¹⁵⁸ *Id.* art. 22.1.

¹⁵⁹ *Id.* art. 19.1.

¹⁶⁰ *Id.* art. 19.3.

¹⁶¹ LCIA ARB. R., at <http://www.lcia-arbitration.com/arb/> (effective Jan. 1, 1998).

documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant.”¹⁶² However, the parties may counter such discovery measures as they must be allowed “a reasonable opportunity to state their views” before discovery is ordered.¹⁶³ On the other hand, the LCIA Rules include a number of non-common law practices, such as “widest discretion” of the tribunal to conduct proceedings,¹⁶⁴ written statements by witnesses,¹⁶⁵ tribunal-appointed experts,¹⁶⁶ and questioning of witnesses by the tribunal.¹⁶⁷

In constantly reshaping their rules, institutions consult widely with users of the rules so that the rules as promulgated do best to meet the needs of their customers.¹⁶⁸ These efforts bear fruit as the major institutional rules have parted with domestic litigation practices in favor of harmonized solutions in order to become more acceptable for parties from around the world. As rules of at least the major arbitration institutions become very similar, and more and more ad hoc arbitrations refer to, or borrow from, the UNCITRAL Arbitration Rules, the common growing experience in the practice of international arbitration will further contribute towards a greater harmonization.¹⁶⁹

¹⁶² *Id.* art. 22.1(e).

¹⁶³ *Id.* art. 22.1.

¹⁶⁴ *Id.* art. 14.2.

¹⁶⁵ *Id.* art. 20.3.

¹⁶⁶ *Id.* art. 21.

¹⁶⁷ *Id.* art. 20.5.

¹⁶⁸ Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 101 (2000) (citing Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 10, at 3, 7 n.10). AAA International Rules “have undergone searching scrutiny by international arbitrators, practitioners and arbitration administrators to ensure that they embody provisions which contemporary practice calls for and with which both American and foreign attorneys are comfortable.” Drahozal, *supra*, at 101 (quoting Michael F. Hoellering, *How to Draft an AAA Arbitration Clause for International Business*, ARB. J., Mar. 1992, at 45).

¹⁶⁹ Karl-Heinz Bockstiegel, *The Internationalisation of International Arbitration: Looking Ahead to the Next Ten Years*, in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION, *supra* note 4, at 78.

2. The 1976 UNCITRAL Arbitration Rules

Numerous ad hoc arbitrations are conducted every year under the 1976 UNCITRAL Arbitration Rules,¹⁷⁰ which have become “the most widely accepted set of procedures for . . . ad hoc arbitration proceedings.”¹⁷¹ This UNCITRAL project was a pioneer in the movement towards harmonization in international arbitration, and the Rules achieved “tremendous acceptance.”¹⁷² The drafters clearly envisioned a potential conflict between different legal traditions in arbitration and attempted to soften it by providing a “culturally-neutral”¹⁷³ procedural regime that is flexible enough to make parties to the dispute relatively comfortable by eliminating the sharp edges of both procedural styles.¹⁷⁴

According to the UNCITRAL Rules, the arbitral tribunal “may conduct the arbitration in such manner as it considers appropriate.”¹⁷⁵ This wide discretion is limited only by the agreement of the parties and the mandatory requirement that each party is treated with equality and awarded an opportunity to be heard.¹⁷⁶ The tribunal may order limited discovery of the documents,¹⁷⁷ consider written witness statements instead of oral presentations,¹⁷⁸ appoint expert witnesses,¹⁷⁹ and determine the manner in which witnesses may be examined.¹⁸⁰ These flexible provisions allow for tailoring of the proceedings to the needs of a specific dispute without imposing on the parties particularities of either Continental or Anglo-Saxon procedure.

¹⁷⁰ UNCITRAL ARB. R., at <http://www.uncitral.org/en-index.htm> (adopted Dec. 15, 1976).

¹⁷¹ Carter, *supra* note 58, at 787.

¹⁷² Alan Uzelac, *UNCITRAL Notes on Organizing Arbitral Proceedings: A Regional View*, 4 CROAT. ARB. Y.B. 135, 136 (1997).

¹⁷³ Rau & Sherman, *supra* note 29, at 94.

¹⁷⁴ It is outside the purpose of this Article to discuss the many innovations of the UNCITRAL Rules. For general information on these Rules, see Pieter Sanders, *Commentary on the UNCITRAL Arbitration Rules*, 2 Y.B. COM. ARB. 172 (1977).

¹⁷⁵ UNCITRAL ARB. R., *supra* note 170, art. 15.1.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* art. 24.3.

¹⁷⁸ *Id.* art. 25.5.

¹⁷⁹ *Id.* art. 27.1.

¹⁸⁰ *Id.* art. 25.4.

The UNCITRAL Rules are being used not only in ad hoc arbitration; they have also influenced the rules of a number of arbitration institutions¹⁸¹ and even various national laws.¹⁸² The major test for the UNCITRAL Rules was their adoption to the proceedings by the Iran-United States Claims Tribunal¹⁸³ where the Rules were successfully used to bridge the gap between common law and Islamic and civil law traditions in a “complex situation involving two governmental parties and hundreds of separate individual arbitrating parties with private claims against Iran.”¹⁸⁴ The UNCITRAL Rules are applied by such diverse arbitration institutions as the Inter-American Commercial Arbitration Commission; Regional Centers of the Asian-African Legal Consultative Commission in Kuala Lumpur, Cairo and Nigeria; the Australian Arbitration Commission; the Hong Kong International Arbitration Center; and the Singapore International Arbitration Center.¹⁸⁵ As a result, the UNCITRAL Rules have gained “even wider acceptance as a model procedural code for conducting international arbitrations”¹⁸⁶ and contributed to harmonization of arbitration rules in general.¹⁸⁷

3. The IBA Rules of Evidence

The great flexibility provided for in the major arbitration rules makes it necessary to prevent “flexibility from degenerating into chaos.”¹⁸⁸ In order to help the tribunals and counsel deal with evidentiary and other complicated matters of arbitral procedure, the International Bar Association adopted, in 1983, the Supplementary Rules Governing the Preparation and Reception of Evidence in International Commercial Arbitration. In 1999 that document

¹⁸¹ Compare *id.* art. 21, with AAA INT’L ARB. R., *supra* note 154, art. 15; UNCITRAL ARB. R., *supra* note 170, arts. 24–30, with AAA INT’L ARB. R., *supra* note 154, arts. 19–25.

¹⁸² See Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 10, at 7; Carter, *supra* note 58, at 791; Gottwald, *supra* note 22, at 212–13; Uzelac, *supra* note 172, at 136.

¹⁸³ CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 12 (1998).

¹⁸⁴ Carter, *supra* note 58, at 790.

¹⁸⁵ PIETER SANDERS, QUO VADIS ARBITRATION? 13 (1999).

¹⁸⁶ BROWER & BRUESCHKE, *supra* note 183, at 20.

¹⁸⁷ SANDERS, *supra* note 185, at 14.

¹⁸⁸ Holtzmann, *supra* note 182, at 16.

was replaced with the IBA Rules on the Taking of Evidence in International Arbitration Proceedings.¹⁸⁹

The IBA Rules of Evidence, which have already been mentioned several times, have been drafted by practitioners and academics from various countries of the world (the chair of the drafting committee was David Rivkin, a partner at the New York office of Debevoise & Plimpton) and truly represent the tendency of harmonization in international arbitration. The IBA Rules eliminate the extremes which can be found in both legal systems and provide for the middle ground, acceptable to both sides.¹⁹⁰ Although there is no available data on how often the Rules are being used in international arbitration, the Rules are viewed as a "significant unifying force in the conduct of international arbitration across the various legal regimes."¹⁹¹

4. *UNCITRAL Notes on Organizing Arbitral Proceedings*

In order to help parties and arbitrators, especially if "arbitrators are not experienced enough and/or if parties and arbitrators do not share the same expectations and the same cultural and legal tradition[s]"¹⁹² to deal with the complexities of "cross-cultural arbitrations,"¹⁹³ Judge Howard Holtzmann proposed, in 1993, the idea of developing guidelines on conducting prehearing conferences.¹⁹⁴ Judge Holtzmann noted that if not dealt with early, "[f]lexibility can lead to unpredictability, and unpredictability can result in surprise in both the written and oral phases of the arbitration,"¹⁹⁵ especially when parties and their counsel come from different legal traditions.

The pre-hearing (or pre-trial) conference is an Anglo-American tradition.¹⁹⁶ With the oral hearing being the center stage of the court proceedings, the judge and counsel for the parties meet in advance to discuss the issues related to discovery and the trial. Due to the piecemeal nature of the Continental trial and the availability of the written dossier, pre-hearing conferences are rarely used in the civil law system, and when they are used, such conferences have different content and function.¹⁹⁷ Not surprisingly,

¹⁸⁹ See generally IBA R. EVID., *supra* note 112.

¹⁹⁰ See *supra* Part II.A.1.

¹⁹¹ Leahy & Bianchi, *supra* note 9, at 28.

¹⁹² Uzelac, *supra* note 172, at 140.

¹⁹³ *Efficient Organization of International Arbitrations*, *supra* note 18, at 86.

¹⁹⁴ See Holtzmann, *supra* note 182, at 19.

¹⁹⁵ *Efficient Organization of International Arbitrations*, *supra* note 18, at 87.

¹⁹⁶ FED. R. CIV. P. 16; Uzelac, *supra* note 172, at 140.

¹⁹⁷ Uzelac, *supra* note 172, at 141.

although “preparatory conference” was provided for under the AAA International Rules¹⁹⁸ (and in the ICSID Rules of Procedure where it was called “preliminary procedural consultation”),¹⁹⁹ until recently, such conferences were largely unknown to most other major arbitration rules²⁰⁰ despite being widely used in practice.²⁰¹ For these reasons, a number of prominent European arbitration practitioners and academics, including Pierre Lalive, objected to developing such guidelines.²⁰²

In order to eliminate objections from civil lawyers, the drafting group dropped the words “pre-hearing conference” and made numerous changes in the document.²⁰³ The Notes on Organizing Arbitral Procedure²⁰⁴ were adopted by UNCITRAL in 1996 “to assist arbitration practitioners by listing and briefly describing questions on which an appropriately timed decision on organizing arbitral proceedings may be useful.”²⁰⁵

In international arbitration, both institutional and ad hoc, pre-hearing conferences are now commonplace.²⁰⁶ The UNCITRAL Notes “inevitably lead[] us from harmonization of rules to harmonization of practices.”²⁰⁷ In this case, a useful Anglo-American procedural device is gaining wide acceptance in international arbitration to benefit parties and arbitrators from both legal traditions.

5. IBA Rules of Ethics

Members of the same arbitral tribunal often come from three different countries. Therefore, they may very well be accustomed to, and guided by, different rules of ethics. Ethical rules used in France or in Switzerland do not necessarily reflect expectations of a lawyer from the State of New York. For example, “Anglo-American jurisdictions are accustomed to far more transparency . . . than are European, Latin American or especially some

¹⁹⁸ AAA INT’L ARB. R., *supra* note 154, art. 16.2.

¹⁹⁹ ICSID R. P. ARB. PROC. 20, at <http://www.worldbank.org/icsid/basicdoc-archive/63.htm> (Jan. 1985).

²⁰⁰ The ICC Terms of Reference might serve as an approximate of a prehearing conference. *E.g.*, Holtzmann, *supra* note 182, at 18; *see* ICC R. ARB., *supra* note 152, art. 18.

²⁰¹ *See* Holtzmann, *supra* note 182, at 17–18.

²⁰² *See* Uzelac, *supra* note 172, at 142–44.

²⁰³ *Id.* at 144.

²⁰⁴ *See* UNCITRAL Notes on Organizing Arbitral Proceedings, at <http://www.uncitral.org/en-index.htm> (finalized June 14, 1996).

²⁰⁵ *Id.*

²⁰⁶ *See* Holtzmann, *supra* note 182, at 18.

²⁰⁷ Uzelac, *supra* note 172, at 154.

Asian societies.”²⁰⁸ Differences may be quite substantial, from the duty of disclosure to confidentiality of communications with a client.

The role of American attorneys in developing certain ethical standards in international commercial arbitration is substantial. Americans, in particular, pushed for greater disclosure in the ICC arbitrations. The 1988 ICC Rules introduced a requirement for a potential arbitrator to disclose relationships not only with the parties and other arbitrators, but with the counsel to the parties as well.²⁰⁹

To balance the differences among ethical rules, the International Bar Association in 1986 adopted the Rules of Ethics for International Arbitrators.²¹⁰

The Rules reflect “internationally acceptable guidelines developed by practicing lawyers from all continents.”²¹¹ The main requirements of the Rules are impartiality, independence, competency, diligence, and discreteness,²¹² and they fit within both Continental and Anglo-American legal tradition. The Rules provide for a greater level of disclosure than Continental arbitration, but, at the same time, they reject the “judicial” standard of disclosure as it was pronounced in the 1968 U.S. Supreme Court decision *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*²¹³ Like the rules we discussed earlier, the IBA Rules of Ethics take the middle ground in an effort to provide a harmonized approach to ethical problems in international commercial arbitration.

In fact, ethical rules is the area of international commercial arbitration that has been most harmonized.²¹⁴ The IBA Rules of Ethics, provisions in national arbitration laws governing ethical obligations, and articles in

²⁰⁸ Ambassador Malcolm Wilkey, *The Practicalities of Cross-Cultural Arbitration*, in 4 *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS* 79, 88 (Stefan N. Frommel & Barry A.K. Rider eds., 1999).

²⁰⁹ 1988 ICC R. ARB. art. 2.7, in W. MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* 453–54 (1997); see also DEZALAY & GARTH, *supra* note 3, at 48–49.

²¹⁰ For the text of the Rules, see TIBOR S. VARADY ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE* 298–02 (2d ed. 2003).

²¹¹ IBA R. ETHICS, *supra* note 209, Introductory Note.

²¹² *Id.* arts. 3.1, 2.2, 7, 9.

²¹³ *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968).

²¹⁴ Howard M. Holtzmann, *Harmonizing the Law of International Dispute Resolution: Practice, Trends and Theory*, Remarks at the ABA Conference International Dispute Resolution by the Rules: Opportunities in Mediation and Arbitration, Washington, D.C. (Sept. 12, 2003).

institutional and other arbitration rules concerning the ethics of arbitrators all correspond to each other.

For example, the duty of disclosure, a core ethical requirement for international arbitrators, is provided for in the IBA Rules of Ethics (“A prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence”);²¹⁵ in the UNCITRAL Model Law on International Commercial Arbitration (“[A]n arbitrator . . . shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.”);²¹⁶ in the ICC Rules of Arbitration (“[A] prospective arbitrator shall sign a statement of independence and disclose in writing . . . any facts or circumstances which might be of such nature as to call into question the arbitrator’s independence in the eyes of the parties.”);²¹⁷ and in the recently adopted UNCITRAL Model Law on International Commercial Conciliation (“[A] conciliator . . . shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.”).²¹⁸ We, therefore, already have a uniform structure of ethical rules around the world.²¹⁹

C. Harmonization of Arbitration Legislation: The UNCITRAL Model Law on International Commercial Arbitration

Another major indicator of the harmonization movement in international commercial arbitration is the widespread adoption of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”). Since promulgation of this document in 1985, forty-four jurisdictions in the world have adopted the Model Law as their national arbitration statute.²²⁰ We find among them Canada (all provinces); New Zealand; India; several states within the United States (including California, Connecticut, Florida and Texas), in short, representatives of the Anglo-American tradition; and civil law countries like Germany, Mexico and Russia. In a number of other countries which have chosen not to adopt the Model Law directly, the influence of the Model Law on their recently adopted arbitration statutes is

²¹⁵ IBA R. ETHICS, *supra* note 209, art. 4.1.

²¹⁶ UNCITRAL MODEL LAW ON INT’L COM. ARB. art. 12.1, at <http://www.uncitral.org/en-index.htm> (adopted June 21, 1985).

²¹⁷ ICC R. ARB., *supra* note 152, art. 7.2.

²¹⁸ UNCITRAL MODEL LAW ON INT’L COM. CONCILIATION art. 5.5, at <http://www.uncitral.org/en-index.htm> (adopted on June 24, 2002).

²¹⁹ Holtzmann, *supra* note 214.

²²⁰ For the text and status of the adoption of the UNCITRAL Model Law, see UNCITRAL MODEL LAW ON INT’L COM. ARB., *supra* note 216.

nevertheless quite obvious.²²¹ Among those countries are such major arbitration centers as England and Sweden.²²²

The UNCITRAL Model Law was prepared by a Working Group representing all thirty-six countries—members of the UNCITRAL.²²³ The Model Law was intended to represent a “sort of international consensus”²²⁴ as to regulation and conduct of international commercial arbitration. Major arbitration institutions also had a chance to have their say during the work on the draft of the Model Law.²²⁵ The goal was to offer a “ready-made package designed for adoption or adaptation to international commercial arbitration anywhere in the world.”²²⁶ The record of the adoption of the Model Law clearly demonstrates that this goal has been reached.

The Model Law “establish[es] a universal procedural format for the arbitral trial”²²⁷ while eliminating the extremes of both Continental and Anglo-American legal traditions. It has even been noticed that by accepting the Model Law, a number of common law jurisdictions used it as a tool to “get away from their origins in this field.”²²⁸ For this reason, we will not find in the Model Law strict rules regarding procedure, such as discovery, cross-examination, or documentary evidence. Instead, the Model Law provides for flexibility of proceedings which the parties or arbitrators can adjust to the needs of a particular dispute.

International arbitration law does not exist—there are only national arbitration laws. “It is only through developments in national laws that the

²²¹ Craig, *supra* note 33, at 27; J. Gillis Wetter, *The Internationalization of International Arbitration*, 11 ARB. INT’L 117, 121 (1995).

²²² “Although England did not adopt the Model Law of UNCITRAL, many provisions of the [1996 Arbitration] Act show that the legislator has taken the Model Law into account.” SANDERS, *supra* note 185, at 31.

²²³ HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 12–13 (1989).

²²⁴ Carter, *supra* note 58, at 788.

²²⁵ See Craig, *supra* note 33, at 25; HOLTZMANN & NEUHAUS, *supra* note 222, at 9.

²²⁶ The Rt. Hon. Lord Justice Kerr, *Commercial Dispute Resolution: The Changing Scene*, in LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE, PC, CMG, OBE, QC 129 (Dr. Maarten Bos & Ian Brownlie eds., 1987).

²²⁷ Thomas E. Carbonneau, *National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 10, at 123.

²²⁸ Allan Philip, *A Century of Internationalization of International Arbitration: An Overview*, in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION, *supra* note 4, at 29.

approaches to international arbitration [began] to converge.”²²⁹ The success of the Model Law demonstrates the effectiveness of this approach, and the Model Law will continue to greatly impact the future of international arbitration throughout the world²³⁰ as a factor “contributing to . . . harmonization and convergence.”²³¹

D. *The 1958 New York Convention*

Any discussion of harmonization of arbitration laws would be incomplete without noting the role played in this process by the 1958 United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which to date, has been ratified by 133 countries.²³² It is perhaps the “most effective instance of international legislation in the entire history of commercial law.”²³³

The role of the New York Convention in “bringing about the uniform standard for the practice of international arbitration”²³⁴ and the “transformation of the judges’ initial attitude towards arbitrators from one of confrontation to one of cooperation”²³⁵ cannot be overestimated. The requirements of the New York Convention, including the ones applicable to arbitration agreements and recognition and enforcement of foreign arbitral awards, directly or indirectly, now constitute an indispensable part of arbitration law in all of the countries that ratified it.²³⁶

This is particularly visible in the national laws based on the UNCITRAL Model Law, the text of which almost literally repeats a number of provisions

²²⁹ Craig, *supra* note 33, at 58.

²³⁰ *Id.* at 35.

²³¹ *Id.* at 58.

²³² For the text and the status of the New York Convention, see Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at <http://www.uncitral.org/en-index.htm> (in force as from June 7, 1959).

²³³ Michael John Mustill, *Arbitration: History and Background*, J. INT’L ARB., June 1989, at 43, 49.

²³⁴ Cremades, *supra* note 2, at 170 n.28.

²³⁵ *Id.* at 170.

²³⁶ For example, the United States included the requirements of the New York Convention in the Federal Arbitration Act. See 9 U.S.C. §§ 201–208 (2000). In Russia, according to Article 15.4 of the 1993 Constitution, international treaties constitute “an integral part of [the Russian] legal system” and do not require implementing legislation after their ratification by the parliament. RUSS. CONST. art. 15, § 4. The New York Convention, therefore, is being applied by the Russian courts directly.

in the New York Convention.²³⁷ The growing number of adoptions and adaptations of the Model Law leads to increasing predictability and uniformity in the application of the New York Convention—the core document of the entire modern system of international commercial arbitration. Hundreds of judicial decisions from all over the world, applying the New York Convention, also contribute to the harmonizing effect of the Convention.²³⁸ “[A]ny national judge can consult [the International Council for Commercial Arbitration’s Yearbook on Arbitration] on how his colleagues apply the same treaty in other countries The jurisprudence arising from the application of the New York Convention in local tribunals has unified the interpretation of its different criteria.”²³⁹ In the words of such an authoritative writer as Pieter Sanders, “We are approaching a global system of arbitration. The main driving forces behind this development are the N[ew] Y[ork] C[onvention] 1958 and the Model Law of UNCITRAL.”²⁴⁰

III. CONCLUSION

There is a strong influence of the American legal tradition on international commercial arbitration. More and more parties from the United States take part in international arbitration proceedings. There are more and more American lawyers active in the arbitration field. The use of American trial techniques and procedures in international arbitration is widespread. Nevertheless, international commercial arbitration has not become “Americanized”; nor has it become “Civilized.” Arbitration is opting for the middle ground and tends to encompass the best of both legal traditions.

In order to be an effective mechanism for resolving international economic disputes, arbitration cannot be dominated by any particular legal tradition. Arbitration must maintain its flexibility and adaptability to the needs of parties from various countries of the world.

There are, and always will be, disputes in which parties lean towards one or the other legal tradition. It can be attributed to the parties’ and their attorneys’ backgrounds, the bargaining power of one of the parties, the composition of the arbitral tribunal, or some other factors. Strong American influence, as well as strong Continental influence, on arbitration will continue. Thanks to both of them, as well as other influences, arbitration is

²³⁷ See New York Convention, *supra* note 232, art. 5; MODEL LAW, *supra* note 216, arts. 34, 36.

²³⁸ SANDERS, *supra* note 185, at 70–71.

²³⁹ Cremades, *supra* note 2, at 170–71.

²⁴⁰ SANDERS, *supra* note 185, at 66.

INTERNATIONAL COMMERCIAL ARBITRATION

moving ahead because positive development normally does not occur without struggle.

The transnational character of arbitration is one of its principal advantages in comparison to litigation before national courts. If arbitration turns into U.S.-style “off-shore litigation,” the incentive to arbitrate international disputes will diminish or even go away. In this increasingly globalized world, it is the international, not national, approach that eventually wins.

